86-373

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEVEN P. FLANAGAN, WILLIAM L. FLANAGAN and MITCHELL L. DRUCKER,

Petitioners,

vs.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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ANTHONY J. BELKOWSKI
On the Petition

QUESTION PRESENTED

Does the Federal Arbitration Act require an account executive, whose contract of employment provides for arbitration of disputes under the then prevailing constitution and rules of the New York Stock Exchange, to arbitrate a claim for defamation where the alleged defamatory statements were made after termination of the account executive's employment and have nothing to do with the account executive's employment or termination of employment?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEVEN P. FLANAGAN, WILLIAM L. FLANAGAN AND MITCHELL L. DRUCKER,

Petitioners,

v.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitoners, Steven P. Flanagan, William L. Flanagan and Mitchell L. Drucker, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on June 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is not yet reported. A copy of this unreported opinion has been reprinted in the Appendix to this Petition at pages 1a-21a. The Appellate Division, First Department, of the Supreme Court of the State of New York affirmed the decision of Special Term Part I of the Supreme Court of the State of New York in and for the County of New York without opinion as reported at 111 A.D.2d 601, 489 N.Y.S.2d 969 (1st Dept. 1985). A copy of the Appellate Division's order is reprinted in the Appendix at pages 22a-23a. The unreported memorandum opinion of Special Term Part I of the Supreme Court of the State of New York in and for the County of New York dated November 15, 1984 is reprinted in the Appendix at pages 24a-37a. A copy of Special Term's order

is reprinted in the Appendix at pages 38a-41a.

JURISDICTION

The final order and judgment of the Court of Appeals of the State of New York was entered on June 19, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

STATUTE INVOLVED

This case involves the Federal Arbitration Act. 9 U.S.C. §1 et. seq. The pertinent provisions of the Federal Arbitration Act are reprinted in the Appendix at page 44a.

STATEMENT OF THE CASE

The federal question sought to be reviewed herein was raised by petitioners prior to trial, in the memorandum opposing respondent's motion to compel arbitration. Same was raised by brief at each stage in the appellate courts.

This is an action for defamation. The complaint was served on September 21, 1984. Petitioners are three licensed and registered securities dealers who were formerly employed as account executives by respondent, a securities broker.

Petitioners commenced their employment with respondent in or about February, 1983 pursuant to identical employment agreements. Paragraph 7 of each employment agreement contains the following arbitration provision:

> Any claim or controversy arising out of or respecting any matter contained in this agreement, or any difference as to the interpretation of any of the provisions of this agreement, shall be settled by arbitration in New York City under the then prevailing Constitution and Rules of the New York Stock Exchange, Inc. In the event such Exchange shall decline to accept jurisdiction of such controversy, such claim shall be settled by arbitration in accordance with the Rules of the American Arbitration Association.

Also, at or about the time petitioners commenced their employment with

respondent, they each executed along with respondent a "Uniform Application for Securities Industry Registration." In these applications, petitioners agreed to be bound by the constitution and rules of the New York Stock Exchange and to arbitrate any dispute between them and respondent that is required to be arbitrated under the rules of the New York Stock Exchange.

Rule 347 of the New York Stock Exchange reads as follows:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

On August 6, 1984 petitioners resigned from their employment with respondent. Thereafter respondent published the

defamatory statements which are the subject of this action. The first defamatory statement is set forth in a letter that was sent by respondent to all of petitioners' customers and other known associations. The letter notified petitioners' customers of their termination of employment with respondent and portrayed petitioners as being drifters who were unreliable in the conduct of their business activities because of their frequent moves from one brokerage house to another. Although the letter is dated the same day as petitioners' resignation it was sent after the termination occurred and obviously not received until sometime thereafter. The letter contains the following libelous statement:

> Dear Client: Messrs. Bill Flanagan, Mitch Drucker and Steve Flanagan are on the road again. We regret if their

frequent moves have caused you inconvenience.

Prudential-Bache Securities will do its part in providing you with an accomplished Account Executive to service your investment needs.

You will be contacted by one of our Executives within the week. If I can be of any personal help to you, please do not hesitate to call.

The second defamation occurred on August 8, 1984, two days after petitioners' resignation. This defamation was made by respondent to petitioners' new employer. It consisted of the false allegation that there were several lawsuits pending against petitioners with respect to their professional conduct while employed by respondent and another former employer.

Prior to trial respondent Prudential-Bache Securities moved at Special Term Part I of the Supreme Court of the State of New York in and for the County of New York for an order staying

petitioners' action and compelling petitioners to submit their claims to arbitration. In denying respondent's motion, Special Term relied upon the decision of the Second Circuit Court of Appeals in Coudert v. Paine Webber, Jackson and Curtis, 705 F.2d 78 (2d Cir. 1983) as being dispositive, finding the reasoning of the court in Coudert to be particularly compelling when applied to the facts of the instant case. Special Term held that the rule in Coudert is not dependent on whether the severance of the employment relationship had occurred a day, a week or months prior to the defamation, but rather, "it [was] the actuality of severance and its temporal relationship, as a prior event, to the libels which [were] decisive."

The Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, without

opinion, unanimously affirmed the decision of Special Term. 111 A.D.2d 601, 489 N.Y.S.2d 969 (1st. Dept. 1985).

The Court of Appeals of the State of New York incorrectly reversed the Appellate Division and Special Term and held that these defamations should be arbitrated. In so doing, the Court of Appeals stated that

> [t]he Federal Arbitration Act. . . requires an account executive whose contract of employment with a stock brokerage firm provides for arbitration under the then prevailing constitution and rules of the New York Stock Exchange to arbitrate a claim for defamation, notwithstanding that the alleged defamatory statements were made after termination of the account executive's employment.

App. at 1a.

The Court of Appeals premised its decision on the misapprehension that the alleged defamatory letter and statements "relate to and are concerned with [petitioners'] performance and the

termination of their employment." In so doing, the Court of Appeals erroneously relied upon the language of the Eighth Circuit Court of Appeals in Morgan v. Smith Barney, Harris Upham and Co., 729 F.2d 1163 (8th Cir. 1984) and the Sixth Circuit Court of Appeals in Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir.), cert. denied ____ U.S. ____, 106 S.Ct. 582 (1985).

By holding that this defamation action falls within the scope of petitioners' agreements to arbitrate, and that the alleged defamatory letter and statements relate to and are concerned with petitoners' performance and termination of their employment, the Court of Appeals of the State of New York is in direct conflict with the Second Circuit Court of Appeals which has held this cause of action subject to judicial resolution rather than arbitration under virtually

identical facts and circumstances. See Coudert v. Paine Webber, Jackson and Curtis, 705 F.2d 78 (2d Cir. 1983).

REASONS FOR GRANTING THE WRIT

The decision of the court below in the instant case has created one of the most blatant opportunities for forum shopping and inconsistent results ever. Certiorari should be granted to resolve the direct conflict between the New York Court of Appeals and the Second Circuit Court of Appeals on the issue of whether such defamatory statements as these, occurring after the termination of employment, fall within the scope of petitioners' arbitration agreements. These conflicts arise from differing interpretations of the Federal Arbitration Act, 9 U.S.C. §1 et. seq. and the body of federal substantive law governing the enforceability and scope of arbitration agreements as created by

Section 2 of that Act. Petitioners respectfully submit that this question is of considerable importance to the securities industry and well worth definitive resolution by the Court.

Clearly, the scope and applicability of the arbitration clauses contained in the constitution and rules of the New York Stock Exchange, as well as the employment agreements signed by member firms and their registered representatives, are of critical importance to the securities industry and will present recurring issues as the industry has adopted arbitration for disputes between member firms and their registered representatives for matters arising out of their employment or termination of employment. Moreover, the controversy has already proven to present a recurring issue and the arbitrability of post-termination defamations has

reached the federal appellate courts on at least three separate occasions since 1983 with seemingly differing results.[1] See Coudert v. Paine Webber, Jackson and Curtis, 705 F.2d 78 (2d Cir. 1983) (denying arbitration); and Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir.), cert. denied, _____ U.S _____, 106 S. Ct. 582 (1985); Morgan v. Smith Barney, Harris Upham and Co.,

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[1] Moreover, on at least two other occasions the state courts in New York have published decisions wherein they have required arbitration of defamation claims pursuant to the New York Stock Exchange constitution and rules. See Purtignano v. Kidder, Peabody & Co., 108 A.D.2d 847, 485 N.Y.S.2d 350 (2d Dept. 1985); Gihron v. Mayr, 19 A.D. 2d 54, 241 N.Y.S.2d 144 (1st Dept. 1963). The issue of the arbitrability of defamatory statements in such a situation has also reached the appellate courts in New York on one other occasion, although based upon the facts of the case arbitration was not compelled. See DeSapio v. Kohlmeyer, 43 A.D. 2d 76, 350 N.Y.S. 2d 132 (1st Dept. 1973), aff'd, 35 N.Y. 2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974).

729 F.2d 1163 (8th Cir. 1984) (favoring arbitration). The Court of Appeals of New York has held the instant dispute arbitrable, thereby deciding an important issue of federal law in direct conflict with decisions of the Second Circuit.

In this case, the court below erroneously held these defamations arbitrable under the Federal Arbitration Act where the claimed libelous statements have nothing whatsoever to do with petitioners' employment agreements (or interpretation thereof), their relationship with respondent or any stock exchange related transaction.

The basic error of the court below in reaching this decision is that it was incorrect in declining to follow the Second Circuit's holding in Coudert v. Paine Webber, Jackson and Curtis, 705 F.2d 78 (2d Cir. 1983), a case which is

absolutely on point and dispositive of all the issues presented in the instant case; instead expressly rejecting the Coudert holding. In Coudert, a case whose facts are virtually identical to those in the instant case, the Second Circuit, in a well reasoned opinion, correctly held these defamations to be subject to judicial resolution. In Coudert, the relationship between plaintiff and defendant was identical to that between petitioners and respondent herein. In that case, plaintiff was a registered representative of the New York Stock Exchange and defendant was a member broker of the New York Stock Exchange. Also, as in the instant case, the alleged libel in Coudert appears to have been motivated by the plaintiff's notification to defendant of her resignation, the defamation being predicated upon the conduct of defendant's office manager

following the resignation. The offensive conduct consisted of advising plaintiff's former co-workers that she had been fired; intimating to plaintiff's clients that she had been fired and left under clouded circumstances; and filing termination forms with the Securities and Exchange Commission and various securities agencies, associations, and state securities departments stating that plaintiff had been fired for cause. Consequently, the relationship between plaintiff and defendant, and more importantly, the relationship between the termination of employment and the defamation, are identical in Coudert and in the instant case. Finally, in Coudert, as in the instant case, the member-broker defendant attempted to force plaintiff to arbitrate her claim pursuant to New York Stock Exchange Rule

347, which she agreed to be bound by.[2] Id. at 79-80.

In a well reasoned opinion, the United States Court of Appeals for the Second Circuit rejected defendant's argument that plaintiff's defamation claim fell within the scope of the arbitration provision set forth in New York Stock Exchange Rule 347. The Second Circuit's

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[2] While Article VIII of the NYSE Constitution also contains an arbitration provision, Rule 347 is intended to be the governing provision regarding arbitration of disputes between employee (registered representatives) and employer (member firms). Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984). The Second Circuit's awareness of Article VIII is clearly confirmed by its opinions in Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 725 F.2d 192 (2d Cir. 1983) and Paine Webber, Jackson and Curtis v. Chase Manhattan Bank, 728 F.2d 577 (2d Cir. 1984) which discuss Article VIII and Coudert.

Although the employment agreements in the instant case contain an additional arbitration provision, the scope of Rule 347 is vastly broader than the scope of the provision for arbitration in the employment agreements applicable hereto.

ruling was primarily based upon its conclusion that New York Stock Exchange Rule 347 was not intended to require the arbitration of a defamation claim based upon utterances occurring after termination of the employment relationship even if the defamation was motivated by the termination. In ruling that plaintiff's claim for defamation was not arbitrable, the Second Circuit found that the dispute did not pertain to her employment or the termination of her employment. Id. at 82. The fact that the tortious acts complained of occurred after termination simply reinforced the court's opinion that such a dispute was not covered by the arbitration agreement.

In two subsequent opinions, the United States Court of Appeals for the Second Circuit clarified its ruling in Coudert. In Downing v. Merrill Lynch, Pierce, Fenner & Smith, 725 F.2d 192 (2d Cir.

1984), the court more clearly expressed the belief that the defamation in Coudert would not be arbitrable simply because of the subject matter of the controversy, without regard to whether or not the employment relationship had previously been terminated. This was expressed in the Downing opinion as follows:

> The result in Coudert stemmed in part from the fact that the dispute erupted after the employment relationship had ceased, but also from the fact that the subject matter of the dispute may have concerned the employer-employee relationship but did not arise directly out of it.... In Coudert the subject matter was a claim sounding in tort and the temporal aspects simply reinforced the quite natural doubts about whether such a dispute was covered by the purported promise to arbitrate....

Id. at 194-95. The holding of the Second Circuit in Coudert, especially as clarified in Downing, is in direct conflict with the New York Court of Appeals' decision granting respondent's motion to compel arbitration based solely

upon the nature of the defamation even without regard to the fact that it occurred after the employment relationship had been terminated.

In its even more recent decision in Paine Webber, Jackson & Curtis v. Chase Manhattan Bank, 728 F.2d 577 (2d Cir. 1984), the Second Circuit once again reaffirmed Coudert, stating:

> The narrow construction implied in Coudert to deny a stay pending arbitration was primarily for the reason that the allegedly slanderous language was made after termination of the employment relationship, and thus, while concerning the employment and termination, the dispute did not arise out of the employment or termination....

Id. at 581 n.6. Both Downing and Chase Manhattan buttress the Second Circuit's opinion in Coudert and are clearly opposed to the New York Court of Appeals' decision in the instant case.

In apparent conflict with the Second Circuit decision in Coudert are the Sixth

Circuit's decision in Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 582 (1985), and the Eighth Circuit's opinion in Morgan v. Smith Barney, Harris Upham and Co., 729 F.2d 1163 (8th Cir. 1984), both of which were erroneously relied upon by the court below in reaching its decision.

The facts in Aspero are similar to those in Coudert in that both cases involve post-termination defamations. The plaintiff in Aspero was a former employee of a brokerage firm who sued that firm for defamation. Following the Aspero plaintiff's resignation, the defendant firm's vice president and resident manager allegedly informed potential employers that plaintiff had been terminated for trading violations and submitted what were alleged to be false Uniform Termination Notice for

Securities Industry Registration forms. Aspero, 768 F.2d at 107. The Sixth Circuit expressly rejected the application of Coudert to those facts and affirmed the order of the District Court compelling arbitration. Id. at 108.

Likewise, in Morgan, another case seemingly in conflict with Coudert, the Eighth Circuit compelled arbitration of post-termination defamation claims. Morgan criticized the Coudert holding's temporal "either-or" test which makes a "dispute's temporal posture ... dispositive," and held that the "arising out of" language of NYSE Rule 347 does not require that the controversy be in the nature of a dispute over the interpretation of a provision of the employment contract, but only that it relate to employment or termination. 729 F.2d at 1165-1167. Analyzing Morgan's defamation claims, including the claim

that defendant "deliberately misinformed customers that plaintiff's Missouri broker's license had been suspended," the Eighth Circuit held that the claims implicating plaintiff's former customers, the status of his license and his handling of customer accounts, revealed a significant relationship between the alleged defamations and his employment with defendant. Id. at 1167. The Court of Appeals therefore compelled arbitration of the dispute. Id. at 1168.

The correct interpretation of the arbitration agreements and the one which is consistent with the intention of the parties, the objectives of the New York Stock Exchange Constitution and the Federal Arbitration Act is that the defamatory statements in the dispute sub judice do not fall within the scope of the arbitration provisions. Unquestionably, petitioners herein could

never have intended these agreements to arbitrate to encompass the intentional and malicious conduct asserted in the complaint any more than they would have intended to arbitrate a physical rather than verbal assault. In holding these defamations arbitrable, the New York State Court of Appeals has made a basic error which must be corrected. Otherwise, its decision shall undermine the well established rule, recognized by the Court, that arbitration is in derogation to the basic right to redress grievances in court and, therefore, a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. See United Steel Workers of America v. Warrior and Gulf Navigation, 363 U.S. 574, 582 (1960).

If the Court were to deny certiorari to petitioners, the conflict between the

Second Circuit and the New York State Court of Appeals, will result in a continuing line of inconsistent decisions resulting in great uncertainty in the securities industry. As the within conflict concerns individuals and entities which must operate in more than one state it is necessary that the Court resolve this matter so as to avoid the undesirable effects of such uncertainty. With the increasing mobility in recent years of registered representatives from one brokerage house to another, the obvious desire of the former employer to retain its customers and the new employer to comply with NYSE regulations by making inquiry of the former, and the increase in defamation litigation, it is apparent that the issues involved in this action are likely to continue to recur.

The importance of resolving this conflict is underscored by the fact that

both the New York Court of Appeals and the Second Circuit's geographic jurisdiction includes the preeminent financial center in this country, namely, New York City. The central offices of virtually all of the major brokerage firms are located there, as are both the New York Stock Exchange and the American Stock Exchange. Unquestionably, if the within case was a diversity action pending in the Southern District of New York, and respondent's motion was made there, the district court would have been bound by Coudert notwithstanding possible conflicts with other circuits or with state courts in New York. Ithaca College v. NLRB, 623 F.2d 224 (2d Cir.), cert. denied, Ithaca College Faculty Ass'n, NYSUT-AFT v. NLRB, 449 U.S. 975 (1980); Hoover v. Allen, 241 F.Supp. 213 (S.D.N.Y. 1965); Banana Distributors, Inc. v. United Fruit Co., 27 F.R.D. 403

(S.D.N.Y. 1961). This conflict between the state and federal courts in New York will encourage forum-shopping, and the patently unfair situation where one aggrieved party is compelled to arbitrate his claims while another, with an identical cause of action, through a fortuitous ability to invoke federal jurisdiction, can choose to simply walk across Foley Square into the United States Courthouse and thereby have the right to litigate his claims. This is the very evil that the Court found to be a compelling justification for the application of the federal law of arbitration in state courts. Namely, the enforceability of an arbitration agreement should not be dependent upon whether one sues in federal or state court. See Southland Corp. v. Keating, 465 U.S. 1 (1984); See also, Moses H. Cone Memorial Hospital v. Mercury

Construction Corp., 460 U.S. 1 26 n. 34 (1983). The conflict herein undermines the very purpose of the Federal Arbitration Act as recognized by the Court in Southland.

This case calls for the Court to correct an incorrect interpretation of the federal law of arbitration by the court below and to settle this legal issue having a nationwide impact affecting the future of the securities industry and the law of arbitration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 4, 1986

APPENDIX

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OPINION OF COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 185
Stephen P. Flanagan et al.,
Respondents,

v.
Prudential-Bache Securities, Inc.,
Appellant.

MEYER, J.

The Federal Arbitration Act (9 USC §§ 1-14) requires an account executive whose contract of employment by a stock brokerage company provides for arbitration under the then prevailing constitution and rules of the New York Stock Exchange to arbitrate a claim for defamation, notwithstanding that the alleged defamatory statements were made after termination of the account executive's employment. The order of the Appellate Division should, therefore, be

OPINION OF COURT OF APPEALS

reversed, with costs, and defendant's motion to compel arbitration granted.

Plaintiffs are registered representatives with the New York Stock Exchange. Their employment by defendant Prudential-Bache began in February 1983 and was terminated on August 6, 1984 when they resigned their positions with defendant and together joined Rooney Pace Inc., another brokerage house. Prior to their employment by defendant they had been with Shearson American Express from May 1981 until January 1983, with Merrill Lynch from June 1980 until May 1981 and with Paine Webber for varying periods ending in June 1980. On the day of their resignations from Prudential-Bache, its Resident Manager addressed a letter to clients that had been serviced by plaintiffs reading in pertinent part, "Messrs. Bill Flanagan, Mitch Drucker and

Steve Flanagan are on the road again. We regret if their frequent moves have caused you inconvenience," and stated Prudential-Bache's desire to continue to service the customer's account. On August 8, 1984, defendant's Resident Manager responded to the request of Rooney Pace's manager for information about plaintiffs' conduct while employed by defendant by stating, so plaintiffs' complaint alleges, that there were three lawsuits pending against them with respect to their professional conduct while employed at Shearson and two additional lawsuits pending with respect to their conduct while employed by defendant. The complaint alleges further that the latter statements were false and that the letter was intended "to portray and characterize plaintiffs as being drifters who were unreliable in the

conduct of their business activities."

Plaintiffs having begun an action for defamation against Prudential-Bache, it moved by order to show cause for an order compelling arbitration and staying the action. Annexed to the moving affidavits were the employment agreements and uniform applications for securities industry registration executed by plaintiffs, as well as copies of provisions of the constitution and rules of the New York Stock Exchange referred to below. The employment agreements each provided that "[a]ny claim or controversy arising out of or respecting any matter contained in this Agreement * * * shall be settled by arbitration in New York City under the then prevailing Constitution and Rules of the New York Stock Exchange, Inc." and in the uniform application each of the plaintiffs agreed

as a condition of consideration of his application (NYSE Rule 345.16) to abide by the constitution and rules of the Exchange as from time to time amended. The applications also included plaintiffs' specific agreements "to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the [New York Stock Exchange]." The constitution of the Exchange provides in article VIII, section 1 that "[a]ny controversy between parties who are members, allied members, member firms or member corporations and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member * * * shall at

the instance of any such party, be submitted for arbitration, in accordancewith the provisions of the Constitution and the Rules of the Board of Directors." Rule 347 of the Exchange rules requires that "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

Notwithstanding plaintiffs' numerous agreements to arbitrate, Special Term, noting the division among the Federal Courts of Appeals on the question and deeming it inappropriate to bypass the

dispositive Second Circuit opinion in Coudert v. Paine Webber Jackson & Curtis (705 F2d 78), denied the motion because "[p]laintiffs' connection with defendant had terminated when the alleged libels were published." On appeal to the Appellate Division, that court affirmed without opinion (111 AD2d 601).

The appeal is before us by our leave (66 NY2d 604). Plaintiffs argue that it should be dismissed for nonfinality* and

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* The case law is clear that an order which either grants or denies an application made under CPLR 7503(a) to compel arbitration is a final order in a special proceeding and appealable (Board of Educ. v. Auburn Teachers Assn., 38 NY2d 740; Merrill Lynch, Pierce, Fenner and Smith v. Griesenbeck, 21 NY2d 688). The Merrill Lynch case held an order directing arbitration made on such a motion to be appealable as a final order and that the "mere fact that this order was made on a motion in a pending action does not impair its finality" (id., at 90).

on the merits that this Court is bound to follow the Second Circuit opinion and that, in any event, the claimed defamatory statements did not come within the scope of plaintiffs' agreements to arbitrate. We disagree and, therefore, reverse and grant defendant's motion.

II

Although enforcement of the Federal Arbitration Act "is left in large part to the state courts," it "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" (Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 US 1, 25, n 32; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, ____ US ____, _____, 105 S Ct 3346, 3353) which is not dependent upon the forum in which the right to arbitration is asserted (Southland Corp. v. Keating, 465

US at 12, 13, supra; GAF Corp. v. Werner, 66 NY2d 97, 102). In such a case we are bound to apply the statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower federal courts if they are in agreement (Alvez v. American Export Lines, 46 NY2d 634, 639, affd 446 US 274).

When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower federal courts, however, a state court required to interpret the federal statute has the same responsibility as the lower federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the federal Circuit Court of Appeals within the territorial boundaries of which it sits (Alvez v. American Export Lines, supra;

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People ex rel. Ray v. Martin, 294 NY 61, 73, affd 326 US 496; New York Rapid Transit Corp. v. City of New York, 275 NY 258, 265, affd 303 US 573, reh denied 304 US 588; Iowa Nat. Bank v. Stewart, 214 Iowa 1229, 232 NW 445; State v. Coleman, 46 NJ 16, 214 A2d 393; Merrill Lynch, Pierce, Fenner & Smith v. McCullom, 666 SW2d 604 [Tex], writ refd n.r.e., cert denied _____ US ____, 105 S Ct 811, reh denied _____ US _____, 105 S Ct 1384; United States ex rel. Lawrence v. Woods, 432 F2d 1072, cert denied 402 US 983; see Note 48 Col L Rev 943; Ann: 147 ALR 847). Thus in the Alvez, Martin and Rapid Transit cases while giving due respect to decisions of the Second Circuit we disagreed with its interpretation, in Alvez as to the rights accorded by maritime law; in Martin as to a federal statute; and in Rapid Transit

OPINION OF COURT OF APPEALS

as to a question of federal constitutional law.

The Supreme Court has been emphatic concerning the "liberal federal policy favoring arbitration agreements" (Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 US at 24, supra) applicable in state as well a federal courts (Southland Corp. v. Keating, 465 US at 12, 15) and requiring that they "rigorously enforce agreements to arbitrate even if the result is 'piecemeal' litigation" (Dean Witter Reynolds Inc. v. Byrd, _____ US _____, _____, 105 S Ct 1238, 1243). Questions of arbitrability are, therefore, to "be addressed with a healthy regard for the federal policy favoring arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor or arbitration" (Moses H. Cone

Memorial Hospital v. Mercury Construction Corp., 460 US at 24-25). "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability" (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, _____ US at ___ 105 S Ct at 3354, supra).

It is against the background of those cases, all except the Moses H. Cone Memorial Hospital case decided since the Second Circuit's decision in Coudert, that we must evaluate the present case. The Coudert holding was that a defamation claim based upon alleged false statements about a registered representative made after her resignation by an officer of the brokerage firm that had employed her did not "arise out of" termination of employment within the meaning of Rule 347, supra, and, therefore, was not

arbitrable. In so holding the court recognized that as to disputes relating to employment or a claim of wrongful termination of employment the arbitration provisions survive employment termination even by way of resignation (725 F2d at 81). Subsequent decisions by other panels of the Second Circuit in Downing v. Merrill Lynch, Pierce, Fenner & Smith (725 F2d 192) and Paine, Webber, Jackson & Curtis v. Chase Manhattan Bank (728 F2d 577) have explained that the critical element in Coudert was not the fact that the dispute erupted after employment had terminated but the fact that the subject in dispute was a defamation claim which "did not arise directly out of" the employer-employee relationship (725 F2d at 194-195). As the Chase Manhattan panel put it: "The narrow construction applied in Coudert to deny a stay

pending arbitration was primarily for the reason that the allegedly slanderous language was made after termination of the employment relationship, and thus, while concerning the employment and termination, the dispute did not arise out of the employment or termination" (728 F2d at 581, n 6; italics in original). That the fact that the dispute arises after termination of the relationship is not determinative of the right to arbitration is, moreover, clear from the Supreme Court's holding in Nolde Bros. v. Bakery & Confectionery Workers (430 US 243). Construing the arbitration provision of a collective bargaining agreement, the Court concluded that a severance pay dispute was arbitrable because it was a dispute which arose under the contract although based on events that occurred after its termination (id., at 252-253).

OPINION OF COURT OF APPEALS

Turning, then, from consideration of when the event occurred to whether it is an event within the scope of the arbitration agreement entered into by the parties, we respectfully decline to follow Coudert for several reasons. First, if we look to the language of Rule 347 alone, we find the reasoning of the Eighth Circuit in Morgan v. Smith Barney, Harris Upham & Co. (729 F2d 1163) and of the Sixth Circuit in Aspero v. Shearson American Exp. Inc. (768 F2d 106, cert denied ____ US _____, 106 S Ct 582) more persuasive and more in keeping with the Supreme Court's admonition that any doubts concerning scope be resolved in favor of arbitration. Both cases dealt with defamatory remarks about a former brokerage employee made after termination of employment. Morgan reasoned that "arising out of employment or termination

of employment" did not require that the controversy arise from the employment contract and, therefore, Rule 347 did not limit arbitration to contractual disputes, but requires "arbitration of tort as well as contract claims which involve significant aspects of the employment relationship" (729 F2d at 1167). Analyzing the claimed defamatory remarks, it concluded that those which implicated the employer's former customers, the status of his broker's license and his handling of customer accounts were arbitrable, but that the statement that he stole things from the desks of other employees at night did not concern his performance as a broker and, therefore, was not. Aspero held the statement that the employee had engaged in unauthorized trading was arbitrable because resolution of the claim depended upon evaluation of

her performance as a broker.

A second and even stronger reason for not following Coudert is that the present case involves a great deal more than Rule 347. As noted above, each of the plaintiffs completed a uniform application for registration as a representative. The uniform application called for arbitration of any dispute required to be arbitrated under the Exchange constitution, and article VIII, section 1 of that constitution required arbitration of any controversy "arising out of the business of" an Exchange member. As the last section of the uniform application evidences, plaintiffs' new employer was required to communicate with all previous employers during the prior three years and to inquire into the past record of each of the three plaintiffs. It was in response to that inquiry that the August 8, 1984

statements to Rooney Pace's manager were made. Those statements in response to an inquiry required by Exchange rules, as evidenced by the uniform application, to be made, arose out of Prudential-Bache's business and, therefore, under the Exchange constitution must be arbitrated. The customer letter also may fairly be said to have arisen from that business for the obvious purpose of the letter was to retain the business of the customers plaintiffs had serviced while employed by defendant. That either or both statements may have been defamatory and that defendant's business is securities, not defamation, is beside the point, for the only question is whether the dispute between plaintiffs and defendant arose out of defendant's business. That defendant's Resident Manager may have acted improperly in making the statements does not detract

from the fact that the manager was acting on defendant's business when he made them (indeed, unless he was, only he and not defendant can be held in damages for them) and that, therefore, they arose out of defendant's business (Purtignano v Kidder, Peabody & Co., 108 AD2d 847; Matter of Ghiron [Mayr], 19 AD2d 54; cf. Aetna Life Ins. Co. v Lourie, 201 SC 478, 23 SE2d 741).

The employment agreement signed by each of the plaintiffs provides yet another reason why arbitration rather than judicial resolution of their claim is required. That agreement calls for arbitration under the Exchange rules of "[a]ny claim or controversy arising out of or respecting any matter contained in this Agreement." The matters contained in the agreement include plaintiffs' employment, performance of their duties as employees

and the termination of their employment. "Respecting" has a broader connotation then "arising out of," for its definition includes "with regard or relation to: REGARDING, CONCERNING" (Webster's Third New International Dictionary, p 1934). The alleged defamatory letter and statements relate to and are concerned with plaintiffs' performance and the termination of their employment. For this reason also the controversy between the parties is within the scope of their agreements as to arbitration.

For the foregoing reasons, the order of the Appellate Division should be reversed, with costs, and defendant's motion to compel arbitration should be granted.

Order r ersed, with costs, and defendant's motion to compel arbitration granted. Opinion by Judge Meyer. Chief

Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

Decided June 10, 1986

ORDER OF THE APPELLATE DIVISION
DATED MAY 28, 1985

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 28, 1985.

Present - Hon. David Ross, Justice
Presiding
Sidney H. Asch
Max Bloom
E. Leo Milonas
Betty Weinberg Ellerin,
Justices.

----------x

Stephen P. Flanagan, William L. Flanagan and Mitchell L. Drucker,

Plaintiffs-Respondents, :

23518N

- against -

:

Prudential-Bache Securities Inc.,

Defendant-Appellant.

----------x

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered

ORDER OF THE APPELLATE DIVISION

DATED MAY 28, 1985

on December 19, 1984, which denied defendant's motion to compel arbitration and for a stay of the action,

And said appeal having been argued by Joel M. Miller of counsel for appellant, and by Richard L. Abramson of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same hereby is affirmed. Respondents shall recover of appellant $50 costs and disbursements of this appeal.

ENTER:

/s/ Harold J. Reyne

Clerk.

MEMORANDUM DECISION OF SPECIAL TERM

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

INDEX NO. 22349/84
Cal. #43 -- 11/7/84

----------x

STEPHEN P. FLANAGAN, WILLIAM L. FLANAGAN and MITCHELL L. DRUCKER,

Plaintiffs,

- against -

PRUDENTIAL-BACHE SECURITIES INC.,

Defendant.

----------x

SHAINSWIT, J.:

Defendant seeks an order compelling arbitration, and staying this libel action on the ground that plaintiffs' claims are subject to arbitration by written agreements.

Plaintiffs, a team of account executives, went to work for defendant in February 1983, bringing with them an established clientele from their previous

employment at Shearson American Express and, before that, at Merrill Lynch. They all resigned on August 6, 1984 to join the firm of Rooney, Pace. Immediately after they notified defendant of their departure, in a letter dated that same day but apparently mailed thereafter, defendant wrote all of plaintiff's clients:

> "Messrs. Bill Flanagan, Mitch Drucker and Steve Flanagan are on the road again. We regret if their frequent moves have caused you inconvenience.
>
> Prudential-Bache Securities will do its part in providing you with an accomplished Account Executive to service your investment needs.
>
> You will be contacted by one of our Executives within the week. If I can be of any personal help to you please do not hesitate to call."

Two days later, on August 8, 1984, in response to a request from plaintiffs' manager at Rooney, Pace, defendants' vice president advised him that there were

MEMORANDUM DECISION OF SPECIAL TERM

three lawsuits pending against plaintiffs with respect to their professional conduct while employed at Shearson American Express, and two additional lawsuits pending against them with respect to their professional conduct while employed at defendant. Plaintiffs allege that this was totally false -- that there were no lawsuits pending against plaintiffs of any sort whatever.

Defendant seeks to stay the libel suit filed by plaintiffs on the basis of these utterances, contending the controversy arises out of plaintiffs' employment or termination of employment, and is therefore subject to various agreements requiring arbitration. Specifically, defendant points to plaintiffs' employment agreements, entered into on January 21, 1984, in which each plaintiff agreed to arbitrate" * * * any claim or

MEMORANDUM DECISION OF SPECIAL TERM

controversy arising out of or respecting any matter contained in this agreement, or any differences as to the interpretation of any of the provisions of this agreement * * *" Further, defendant cites a Uniform Application for Securities Industry Regulation, signed by each plaintiff, in which each agreed to abide by all the New York Stock Exchange statutes, rules, regulations, etc., and further agreed, specifically, " * * * to arbitrate any dispute, claim or controversy that may arise between me and my firm * * * that is required to be arbitrated under the rules, constitutions, or by-laws of the organization with which I registered * * *"

Finally, defendant cites the New York Stock Exchange Rules. First, it relies on Rule 347, which provides that "any

MEMORANDUM DECISION OF SPECIAL TERM

controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization shall be settled by arbitration * * *" Defendant furtner cites Article 8, Section I of the Stock Exchange constitution, which provides that "any controversy between a non-member and a member * * * which arises out of the business of such member * * * shall * * * be submitted for arbitration, in accordance with the provisions of the constitution and the rules of the Board of Directors."

The only case cited by defendant in its original moving papers, specifically involving arbitration and a libel action, was Ghiron v. Mayr, 19 AD2d 54 (1st Dept. 1963). There the Appellate Division

MEMORANDUM DECISION OF SPECIAL TERM

ruled that the New York Stock Exchange arbitration provisions were applicable to a suit between a registered representative and a member firm concerning utterances concededly spoken by the representative " * * * while engaged in his duties, as a representative or employee of respondents and in connection with their business. As such, the controversy arises out of the business of the respondents and the employment of the petitioner."

Plaintiffs do not dispute that they are bound by arbitration requirements in regard to disputes arising out of their employment. Their contention is that the libel action is based on conduct that occurred after the termination of their employment, and did not involve either their employment or its termination.

MEMORANDUM DECISION OF SPECIAL TERM

As regards the law in New York State, plaintiffs note that Ghiron is clearly distinguishable on the facts, and they cite in their support DeSapio v. Kohlmayer, 43 AD2d 76 (1st Dept. 1973), aff'd on other grd, 35 NY2d 402 (1974), where a claim by a registered representative against his former employer, based on a defamation uttered nine months after the termination of the employment relationship, was held not arbitrable. The alleged libel there was a statement by defendant to an investigator that plaintiff had stolen money, and further questioning plaintiff's morals. The Appellate Division concluded that " * * * neither plaintiff nor the defendants agreed to indefinite arbitration after plaintiff left his employment."

Plaintiff's primary reliance, however, is on recent federal decisions by the Court of Appeals in this circuit:

Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78 (1983)

Downing v. Merrill Lynch Pierce Fenner & Smith, 725 F.2d 192 (1984)

Paine Webber Jackson & Curtis v. Chase Manhattan Bank, 728 F.2d 577 (1984)

In the Coudert case, plaintiff, a registered representative, resigned voluntarily from Paine Webber, and the latter's office manager then told the representative's co-workers and clients, as well as the SEC, that plaintiff had been discharged for cause. The Court of Appeals refused to hold the resulting libel action subject to the arbitration clauses, ruling that the utterances complained of did not directly relate to plaintiff's employment or its termination, and that, in any event, the

MEMORANDUM DECISION OF SPECIAL TERM

arbitration clause was not applicable to utterances issued after the termination, even if they were motivated by the termination. The Court stated (at 81-2):

> "* * * [A] party cannot be required to submit to arbitration any disputes which he has not agreed to submit.
>
> * * * And it is the general law of this circuit that there is no duty to arbitrate a grievance arising after the termination of the agreement between the parties, even if the expired agreement included an arbitration clause.
>
> * * * Thus only grievances based on conditions arising '<u>during the term of the agreement to arbitrate</u>' are arbitrable after the term has ended.
>
> "* * * In the present state of the record we must look to the complaint to determine whether this dispute pertains either to employment or termination, or whether it simply alleges tortious conduct arising after termination. The complaint plainly alleges that Coudert had voluntarily resigned before the alleged false statements were made to co-workers, customers, and various securities exchanges and organizations, and it is a short road from here to the conclusion that this controversy is not controlled by an arbitration clause that governs only employment or

> termination. Paine Webber would have us hold that as a matter of law the present claims 'aris[e] out of' the termination of employment of the plaintiff. Certainly they concern such termination in the limited sense that each of the three grounds for relief stated by Coudert in her complaint rests on statements suggesting that she was discharged for cause rather than that sne resigned.
>
> But this is not what NYSE Rule 347 addresses either under the case law we have above cited or under its precise language, 'arising out of termination.'"

This ruling was reaffirmed a year later in Paine Webber Jackson and Curtis v. Chase Manhattan, supra. Here the Court of Appeals pointed out that the Ghiron decision by the Appellate Division for this Department in 1963 ordered arbitration because the controversy:

> "* * * arise[s] out of the plaintiff member firm's exchange business and the former representative's employment. Absent an exchange-related transaction relationship, the slanderous words would not have been uttered."

In this connection the Court noted that the term "business" in the New York Stock Exchange rules is limited to exchange-related business.

Further, the Court noted that this was all consistent with the Coudert ruling, saying:

> "* * * The narrow construction applied in Coudert to deny a stay pending arbitration was primarily for the reason that the allegedly slanderous language was made after termination of the employment relationship, and, thus, while concerning the employment and termination, the dispute did not arise out of the employment or termination. See also Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 725 F.2d 192, 194-5 (2 Cir. 1984)."

The Downing case is incorrectly relied on by defendant to support is position. In Downing, a dispute over violation of a non-compete agreement signed by a former registered representative was held to be subject to arbitration, even though it

MEMORANDUM DECISION OF SPECIAL TERMS

arose, obviously, after termination of employment. The Court of Appeals pointed out that Coudert was not applicable, stating:

> "The result in Coudert stemmed in part from the fact that the dispute erupted after the employment relationship had ceased but also from the fact that the subject matter of the dispute may have concerned the employer-employee relationship but did not arise directly out of it. In the present case, the dispute between Downing and Merrill Lynch is over his employment contract and in particular over a clause purporting to affect his conduct after termination of the employment relationship. If the parties had an agreement to arbitrate, a dispute over such a contract term would clearly be arbitrable notwithstanding the time at which the dispute arose. In Coudert, the subject matter was a claim sounding in tort and the temporal aspects simply reinforced the quite natural doubts about whether such a dispute was covered by the purported promise to arbitrate. In the present case, the temporal aspect is an inevitable consequence of the contract clause in issue."

Plaintiffs contend, and defendant concurs, that federal law is controlling

MEMORANDUM DECISION OF SPECIAL TERM

in an action such as this, citing Section 2 of the Federal Arbitration Act. However, defendant contends that this court should reject the teaching of the Second Circuit in Coudert, and reach out for an Eighth Circuit decision Morgan v. Smith Barney Harris Upham and Company, 729 F.2d 1163 (1984). The court deems it inappropriate to bypass a dispositive Second Circuit opinion. Further, the reasoning of the Coudert opinion appears to this court to be compelling, particularly as applied to our set of facts. Plaintiffs' connection with defendant had terminated when the alleged libels were published. The Coudert rule does not depend on whether the severance had occurred a day, a week, or months prior to the alleged libels. It is the actuality of severance and its temporal relationship, as a prior event, to the

MEMORANDUM DECISION OF SPECIAL TERM

libels, which is decisive. Accordingly, the motion to compel arbitration, and for a stay, is in all respects denied. The temporary restraining order is hereby vacated.

Settle order in conformity with the foregoing.

Dated: November 15, 1984

/s/ Beatrice Shainswit
J.S.C.

ORDER OF SPECIAL TERM DENYING
MOTION TO COMPEL ARBITRATION

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York, on the 16th day of December, 1986.

Present: Hon. Beatrice Shainswit, Justice

STEPHEN P. FLANAGAN, WILLIAM L. FLANAGAN and MITCHELL L. DRUCKER,

Plaintiffs,

-against-

PRUDENTIAL-BACHE SECURITIES INC.,

Defendant.

ORDER

Index No. 22349/84

The defendant, Prudential, Bache Securities, Inc., by its attorneys, Miller & Wrubel, P.C., having moving by Order to Show Cause for an Order pursuant to CPLR Article 75 and Section 2201 compelling

arbitration of the claims which are the subject matter of the above entitled action and staying the action on the ground that the claims are subject to arbitration and the Order to Show Cause having stayed the time for defendant to answer, move or otherwise respond to the complaint pending hearing of the motion which was subsequently continued to the determination thereof, and the motion having regularly come on to be heard,

Now, upon reading and filing the Order to Snow Cause signed by Hon. Jawn Sandifer dated the 11th day of October, 1984, the affidavit of Martin D. Edel, in support of the motion, sworn to on the 11th day of October, 1984, and the complaint heretofore served herein which is annexed to said affidavit as an exhibit, and upon the affidavit of Cynthia Ferry sworn to on the 11th day of October, 1984, and the

ORDER OF SPECIAL TERM DENYING
MOTION TO COMPEL ARBITRATION

exhibits annexed thereto which contain the alleged agreements to arbitrate, and upon the further affidavit Martin D. Edel, sworn to on the 2nd day of November, 1984, and the exhibit annexed thereto which contains an alleged further agreement to arbitrate, in opposition to the motion, and after due deliberation having been held thereon, and upon the written opinion of the Court dated November 15, 1984,

Now, upon motion of Peckar & Abramson, attorneys for plaintiffs Stephen P. Flanagan, William L. Flanagan and Mitchell L. Drucker, it is

ORDERED, that the motion to compel and for a stay of this action, is denied and the within action shall proceed and it is further

ORDER OF SPECIAL TERM DENYING
MOTION TO COMPEL ARBITRATION

ORDERED, tnat the temporary restraining order staying defendant's time to answer, move or otherwise respond to the complaint, vacated.

Enter,

/s/ Beatrice Shainswit

J.S.C.

ORDER OF REMITTITUR ENTERED JUNE 19, 1986

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge,
Presiding

x

No. 185

Stephen P. Flanagan, et al.,
Respondents,

v.

Prudential-Bache Securities, Inc.,
Appellant.

x

The appellant in the above entitled appeal appeared by Miller and Wrubel, P.C.; the respondent(s) appeared by Peckar and Abramson, Esqs.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and defendant's motion to compel arbitration granted. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

ORDER OF REMITTITUR ENTERED JUNE 19, 1986

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw
DONALD M. SHERAW

Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 10, 1986.

FEDERAL ARBITRATION ACT

9 U.S.C. §2 Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEVEN P. FLANAGAN, WILLIAM L. FLANAGAN and MITCHELL L. DRUCKER,

Petitioners,

vs.

PRUDENTIAL-BACHE SECURITIES INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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30 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Should review be granted where the state court's determination is consistent with the prior decisions of this Court and the federal courts of appeal?

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RESTATEMENT OF THE CASE

Petitioners' statement of the case requires correction for it fails to acknowledge the following relevant facts.

In 1983, as a condition of consideration of their applications for registration as New York Stock Exchange ("NYSE") registered representatives, each petitioner agreed in writing to be bound by the NYSE rules and constitution. (4a-5a)[1]

NYSE Rule 347 expressly mandates arbitration for "[a]ny controversy. . . arising out of the employment or the termination of employment." (6a)

NYSE Constitution, Article VIII, Section 1, by which petitioners also agreed to be bound, provides that "any controversy between a non-member and a

---

1. Citations to Petitioners' Appendix are designated "___ a."

member. . . arising out of the business of such member. . . shall. . . be submitted for arbitration, in accordance with the provisions of the constitution and the rules of the Board of Directors." (5a-6a)

Moreover, each petitioner executed an employment agreement with respondent in which petitioners agreed to arbitrate "any claim or controversy arising out of or respecting any matter contained in [the] Agreement." (4a)

On August 6, 1984, without prior notice, petitioners terminated their employment with respondent and immediately began employment with Rooney Pace, Inc., another NYSE member. (2a)

In their complaint, petitioners allege that respondent defamed them the same day "immediately after [petitioners] notified [respondent] of the termination of their

employment" by writing to respondent's customers theretofore serviced by petitioners. The text of that letter appears at Pet. 6-7.

NYSE Rule 345.18 obligated petitioners' new employer to "make a thorough inquiry" with respondent, as petitioners' prior employer, as to petitioners' "reputation." NYSE Rule 345.18 provides, in relevant part:

> "Investigation and Records.--Members and member organizations should make a thorough inquiry into the previous record and reputation of persons whom they contemplate employing. The background and reputation checks should, whenever possible, include at least personal conversations with all employers during the previous 3 years."

On August 8, 1984, two days after petitioners' termination, petitioners' new employer requested information as to petitioners' conduct during their employment with respondent. According to the complaint, respondent defamed petitioners

by giving false information as to their "professional conduct while employed at [respondent]." (emphasis added) The complaint reads in relevant part as follows:

> "11. On or about August 8, 1984, defendant, by and through its Vice President Felix McCarthy, again defamed plaintiffs in their business reputation by making the false, defamatory, malicious and slanderous statement to Edmond O'Donnell, plaintiffs manager at Rooney Pace, Inc., that there were three lawsuits pending against plaintiffs with respect to their professional conduct while employed at Shearson American Express and two additional lawsuits pending against plaintiffs with respect to their professional conduct while employed at defendant." (¶ 11; emphasis added)

Based on each of the arbitration agreements, the New York Court of Appeals determined that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1983), required petitioners to arbitrate these defamation claims, "notwithstanding that the alleged defamatory statements were made after

termination of the account executive's employment." (1a)

The Court of Appeals held that NYSE Rule 347 is not limited to contractual disputes but includes (i) claims "which involve significant aspects of the employment relationship" (16a, quoting Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1167 (8th Cir. 1984)) and (ii) disputes based on post-employment events which relate to employment (14a, citing Nolde Bros. v. Bakery & Confectionery Workers, 430 U.S. 243, 252 (1977)).

In addition to citing NYSE Rule 347, the Court of Appeals found that arbitration was required (i) by the NYSE Constitution, because the dispute arises "out of the business of a NYSE member" (17a-19a), and (ii) pursuant to the employment agreement signed by each peti-

tioner, because this dispute is a "claim or controversy arising out of or respecting" matters in the employment agreement, which included petitioners' performance as employees and termination of their employment. (19a-20a)

ARGUMENT

REVIEW SHOULD NOT BE GRANTED BECAUSE THE STATE COURT'S DETERMINATION IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEAL

There are no "special and important reasons" for granting review of the state court's decision. See Supreme Court Rule 17.1; Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). The New York State Court of Appeals based its decision on two independent grounds not before the Second Circuit in Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78 (2d Cir. 1983) ("Coudert"), on which

petitioners mainly rely.[2] Moreover, the state court's decision is wholly consistent with the prior decisions of this Court and the federal courts of appeal, which have uniformly declared the national policy of favoring arbitration of these disputes.

A. The NYSE Constitution and Petitioners' Employment Agreements Were Not Before the Second Circuit in Coudert and the State Court's Reliance on These Factors Therefore Was Not in Conflict With the Coudert Decision

Petitioners' main basis for petitioning for a writ of certiorari is a purported conflict between the New York State Court of Appeals' decision and that of the Second Circuit in Coudert.

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2. Coudert was decided by a divided panel of the Second Circuit. The dissenting judge in that case was Judge Weis, a Judge of the Third Circuit Court of Appeal sitting by designation. (705 F.2d at 79)

(Supreme Court Rule 17.1(b)) In Coudert, the Second Circuit held that a dispute as to defamatory statements made after termination of employment was not required to be arbitrated pursuant to NYSE Rule 347. Petitioners claim that as a result of the purported conflict, great uncertainty will exist in the securities industry and forum-shopping could occur between New York State and New York federal courts when diversity jurisdiction is present. (Pet. at 25-28)

The only issue before the Second Circuit in Coudert, however, was NYSE Rule 347. "[T]he sole issue raised by defendant's motion. . . is whether the parties are compelled to arbitrate their disputes under the rules of the New York Stock Exchange." Coudert v. Paine Webber Jackson & Curtis, 543 F. Supp. 122 (D. Conn. 1982) rev'd, 705 F.2d 78 (2d Cir.

1983). The New York State Court of Appeals, however, found that this case "involves a great deal more than Rule 347" (17a) and stated two additional independent bases for its decision in favor of compelling arbitration: (1) the NYSE Constitution, Art. VIII, Section 1 (17a-19a); and (2) the language of petitioners' employment agreements with respondent (19a-20a).

NYSE Constitution, Art. VIII, Section 1, requires arbitration of any controversy "arising out of the business of" an NYSE member (17a). This language differs from that of Rule 347, which refers only to controversies arising out of "employment or termination of employment." The New York State Court of Appeals found that the first alleged defamation -- the customer letter -- "may be fairly said to have arisen from [respondent's] business

for the obvious purpose of the letter was to retain the business of the customers plaintiff had serviced while employed by defendant." (18a) The Court found that the second alleged defamation also "arose out of [respondent's] business and, therefore, under the Exchange Constitution must be arbitrated" because it was in response to an inquiry required by NYSE Rules. (18a)

The Court of Appeals found that the individual employment agreement "provides yet another reason why arbitration rather than judicial resolution of their claim is required." (19a) Those agreements refer to matters "arising out of or respecting" employment, performance or termination. The Court of Appeals found that "respecting" has a "broader connotation than 'arising out of.'" (20a) Consequently, the Court of Appeals found

the controversy to be within the scope of the arbitration provision of the employment agreements. It is not appropriate for this Court to grant certiorari to review individual employment agreements containing facts unique to this litigation. Rice v. Sioux City Memorial Park Cemetery, Inc., supra, 349 U.S. at 74.

The New York Court of Appeals thus provided grounds for arbitration other than the language of the NYSE Rule 347. The Second Circuit in Coudert did not have these additional grounds before it. There is no conflict between the New York State Court of Appeals and the Second Circuit.

Because of these independent bases for the state court's decision, there is no threat of forum shopping. Indeed, the state court decision is fully consistent with Second Circuit decisions subsequent

to Coudert which addressed NYSE Constitution, Article VIII, Section 1, or specific language in employment agreements which -- as here -- required certain actions after termination. See Paine, Webber, Jackson & Curtis v. Chase Manhattan Bank, N.A., 728 F.2d 577, 581 n.6 (2d Cir. 1984) (limiting Coudert to the "narrow construction" of the terms "employment" and "termination"); Downing v. Merrill Lynch, Pierce, Fenner & Smith Inc., 725 F.2d 192, 194-95 (2d Cir. 1984) (distinguishing Coudert and compelling arbitration after addressing Article VIII, Section 1 and the language of the employment agreement which involved post-termination conduct). A recent district court decision has followed this limitation of Coudert and ordered arbitration of a dispute similar to petitioners' claims here. McMahon v. RMS

Electronics, Inc., 618 F. Supp. 189, 192 (S.D.N.Y. 1985) (distinguishing Coudert because defamatory statements after termination were contained in "required reports" under the employment agreement). These Second Circuit decisions are consistent with the New York State Court of Appeals' decision; there can be no legitimate anticipation of forum shopping.

B. The State Court Decision is Consistent With Post-Coudert Decisions By This Court and the Federal Courts of Appeal

In staying the action in favor of arbitration (20a), the New York Court of Appeals applied the holdings of this Court's unbroken line of cases which have mandated that questions of arbitrability are to "be addressed with a healthy regard for the federal policy favoring arbitration" and "any doubts concerning

the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("Cone"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, ___ U.S. ___, 105 S.Ct. 3346, 3354 (1985) (antitrust); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238 (1985) (securities industry). While Cone, supra, was decided before Coudert, the argument in Coudert preceded this Court's decision in Cone. Each of the latter two decisions was made after the Second Circuit's decision in Coudert.

In applying the policy favoring arbitration, this Court consistently has found that "contract termination does not control the arbitrability of th[e] claim." Nolde Bros., Inc. v. Local No.

358, Bakery & Confectionery Workers Union, supra, 430 U.S. at 252 (1977).

Subsequent to Coudert, every federal Court of Appeals which has decided issues involving the arbitrability of alleged post-termination defamations of employees of securities brokerage firms by the employer has required arbitration. Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986); Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir.), cert. denied, ___ U.S. __ , 106 S.Ct. 582 (1985); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984). Each of those decisions is consistent with the decision below.

Given that the Second Circuit has narrowed the Coudert holding to its limited facts, see Chase Manhattan, supra, 728 F.2d at 581 n.6, Downing, supra, 725 F.2d at 194-195, there is no real con-

flict among the circuits and there is no important reason for this Court to review the New York State Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, the Court should not grant the petition for a writ of certiorari to the Court of Appeals of the State of New York.

Dated: New York, New York
October 2, 1986

Respectfully submitted,

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LISTING OF PARENTS, SUBSIDIARIES
AND AFFILIATES AS REQUIRED BY
SUPREME COURT RULE 28.1

A. PRUDENTIAL CAPITAL AND INVESTMENT SERVICES, INC.

Prudential Securities Group Inc.

The Prudential Bank and Trust Company

PruCapital, Inc.

Prudential Global Funding, Inc.

London Global Funding Limited

PGF Canada, Ltd.

B. PRUDENTIAL SECURITIES GROUP INC. (formerly BACHE GROUP INC.)

Bache Cortis & Carr Limited

Bache Halsey Stuart Shields Holding Corporation

Bache Insurance Agency of Arkansas, Inc.

Bache Insurance Agency of Louisiana, Inc.

Bache Insurance Agency of Nevada, Inc.

Bache London Limited

Bache Precious Metals, Inc.

Bache Securities Inc.

Clive Discount Holdings PLC

Clive Discount Company Limited

Clive Discount Holdings International Limited

Clivco Ltd.

Clivwell Securities Limited

Clive Investments Cambridge Limited

Clive Investments Limited

Page & Gwyther Limited

Page & Gwyther Investment Limited

Page & Gwyther Holdings Limited

Halsey Stuart Corporate Services Limited

P-B Finance Ltd.

P-B Securities, Down, de Boer & Duckett, Ltd.

Circle (Nominees) Limited

P-BC Gilts Limited

P-B Securities Limited

P-B Securities Money Brokers Limited

P-B Securities (Unit Trust Sales) Limited

P-B Services (U.K.)

Prudential-Bache Agriculture Inc.

Prudential-Bache Energy Corp.

Prudential-Bache Energy Production Inc.

Prudential-Bache Investor Services Inc.

Prudential-Bache Investor Services II, Inc.

Prudential-Bache Latin America Inc.

Prudential-Bache Leasing Inc.

Prudential-Bache Metal Co. Inc.

Prudential-Bache Minerals Inc.

Prudential-Bache Program Services Inc.

Prudential-Bache Properties, Inc.

Prudential-Bache Real Estate, Inc.

Prudential-Bache Securities Inc.

Prudential-Bache Southern Europe Inc.

Prudential-Bache Trade Corporation

Bache Pacific Trade Limited

Bache Trade Finance Asia Ltd.

K.K. PB Trade Corporation

PB International Bank S.A.

PBTC International Bank

PBTC London Holdings, Inc.

PB Trade Finance Ltd.

PB Trade Ltd.

PB Trade Finance Co., S.A. (PB Trafco)

PB Trade Portugal Lda.

Prudential-Bache Venture Capital Inc.

R & D Funding Corp.

Seaport Futures Management Inc.

Special Situations Management Inc.

C. PRUDENTIAL-BACHE SECURITIES INC.

Bache & Co. (Lebanon) S.A.L.

Bache & Co. S.A. de C.V. (Mexico)

Bache Halsey Stuart Commodities S.A.

Bache Halsey Stuart Shields (Antilles) N.V.

Bache Insurance Agency, Incorporated

Bache Insurance of Arizona Inc.

Bache Insurance of Kentucky Inc.

Bache Securities Asia Pacific Ltd.

Bache Securities Espana, S.A.

Bache Inversiones, S.A.

Bache Securities (Belgium) Inc.

Bache Securities (France) S.A.

Bache Securities (Germany) Inc.

Bache Securities (Greece) S.A.

Bache Securities (Holland) Inc.

Bache Securities (Hong Kong) Limited

Bache Halsey Stuart Shields (U.K.) Ltd.

Bache Securities (Italy) Inc.

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Bache Securities (Luxembourg) Inc.

Bache Securities (Monaco) Inc.

Bache Securities (South America) S.A.

Bache Securities (Argentina) S.A.

Bache Securities (Switzerland) Inc.

Bache Securities (U.K.) Inc.

Bache Shields Securities Corporation

Banom Corporation

Coba, Inc.

Bache & Company Italy, Inc.

Shields & Company S.A. Geneva

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Prudential-Bache Mortgage Services Inc.

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Shields Model Roland Company (London)

Shields Model Roland (Nominees) Incorporated

Shields Model Roland Securities Incorporated